

1 LAW OFFICES OF BARRY S. ZELNER

(Bar No. 73278)

2 16055 Ventura Boulevard, Suite 505

3 Encino, California 91436

(323) 272-9119 (Tel)

4 (818)986-1935 (Fax)

5 Email: ligiamramirez@yahoo.com

barryzelner@yahoo.com

7 In association with:

8 James S. Link (Bar No. 94280)

9 215 N. Marengo Ave., 3rd Floor

10 Pasadena, CA 91101

626-793-9570

11 james.s.link@att.net

12 Attorney for Plaintiff Alton Harding

14 IN THE UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

17 ALTON HARDING,

18 Plaintiff,

20 v.

21 MACY'S and DOES 1 through 20,
22 Inclusive,

23 Defendants.

Case No.: 16-cv-00772-DOC (SKx)

**Joint Stipulation Re: Discovery
Disputes**

Discovery Document: Referred to
Magistrate Judge Steve Kim

Hearing Date: 12/14/16

Time: 10:00 a.m.

Courtroom: 24

Discovery CutOff: June 2, 2017

Motion CutOff: July 10, 2017

Final Pretrial Conference: August 7, 2017

Jury Trial: September 5, 2017

TABLE OF CONTENTS

| | | |
|----|--|----|
| 1 | | |
| 2 | TABLE OF CONTENTS | 2 |
| 3 | PLAINTIFF’S INTRODUCTION | 5 |
| 4 | DEFENDANT’S INTRODUCTION | 6 |
| 5 | SPECIFIC DISCOVERY IN ISSUE | 11 |
| 6 | REQUEST FOR PRODUCTION NO.3: | 11 |
| 7 | FURTHER RESPONSE TO REQUEST FOR PRODUCTION NO. 3: | 11 |
| 8 | PLAINTIFF’S ARGUMENT FOR FURTHER RESPONSE TO REQUEST FOR | |
| 9 | PRODUCTION NO. 3 | 11 |
| 10 | DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR FURTHER | |
| 11 | RESPONSE TO REQUEST FOR PRODUCTION NO. 3; REQUEST FOR | |
| 12 | PROTECTIVE ORDER | 15 |
| 13 | REQUEST FOR PRODUCTION NO. 4.: | 21 |
| 14 | FURTHER RESPONSE TO REQUEST FOR PRODUCTION NO. 4: | 21 |
| 15 | PLAINTIFF’S ARGUMENT FOR FURTHER RESPONSE TO REQUEST FOR | |
| 16 | PRODUCTION NO. 4 | 22 |
| 17 | DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR FURTHER | |
| 18 | RESPONSE TO REQUEST FOR PRODUCTION NO. 4 | 23 |
| 19 | INTERROGATORY NO. 4: | 25 |
| 20 | FURTHER RESPONSE TO INTERROGATORY NO. 4: | 25 |
| 21 | PLAINTIFF’S ARGUMENT FOR FURTHER RESPONSE TO | |
| 22 | INTERROGATORY NO. 4 | 25 |
| 23 | DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR FURTHER | |
| 24 | RESPONSE TO INTERROGATORY NO. 4 | 26 |
| 25 | INTERROGATORY NO. 8: | 26 |
| 26 | FURTHER RESPONSE TO INTERROGATORY NO. 8: | 26 |
| 27 | PLAINTIFF’S ARGUMENT FOR FURTHER RESPONSE TO | |
| 28 | INTERROGATORY NO. 8 | 27 |

| | | |
|----|--|----|
| 1 | DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR FURTHER | |
| 2 | RESPONSE TO INTERROGATORY NO. 8; REQUEST FOR PROTECTIVE | |
| 3 | ORDER | 28 |
| 4 | INTERROGATORY NO. 9: | 28 |
| 5 | FURTHER RESPONSE TO INTERROGATORY NO. 9:..... | 29 |
| 6 | PLAINTIFF’S ARGUMENT FOR FURTHER RESPONSE TO | |
| 7 | INTERROGATORY NO. 9 | 29 |
| 8 | DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR FURTHER | |
| 9 | RESPONSE TO INTERROGATORY NO. 9; REQUEST FOR PROTECTIVE | |
| 10 | ORDER | 30 |
| 11 | INTERROGATORY NO. 10: | 30 |
| 12 | FURTHER RESPONSE TO INTERROGATORY NO. 10:..... | 30 |
| 13 | PLAINTIFF’S ARGUMENT FOR FURTHER RESPONSE TO | |
| 14 | INTERROGATORY NO. 10 | 31 |
| 15 | DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR FURTHER | |
| 16 | RESPONSE TO INTERROGATORY NO. 10; REQUEST FOR PROTECTIVE | |
| 17 | ORDER | 31 |
| 18 | INTERROGATORY NO. 11: | 32 |
| 19 | FURTHER RESPONSE TO INTERROGATORY NO. 11:..... | 32 |
| 20 | PLAINTIFF’S ARGUMENT FOR FURTHER RESPONSE TO | |
| 21 | INTERROGATORY NO. 11 | 32 |
| 22 | DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR FURTHER | |
| 23 | RESPONSE TO INTERROGATORY NO. 11; REQUEST FOR PROTECTIVE | |
| 24 | ORDER | 33 |
| 25 | INTERROGATORY NO. 12: | 33 |
| 26 | FURTHER RESPONSE TO INTERROGATORY NO. 12:..... | 33 |
| 27 | PLAINTIFF’S ARGUMENT FOR FURTHER RESPONSE TO | |
| 28 | INTERROGATORY NO. 12 | 33 |

| | | |
|---|--|----|
| 1 | DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR FURTHER | |
| 2 | RESPONSE TO INTERROGATORY NO. 12; REQUEST FOR PROTECTIVE | |
| 3 | ORDER | 34 |

1
2 Plaintiff Alton Harding and Defendant Macy's West Stores, Inc. hereby
3 submit the following joint stipulation of discovery disputes on plaintiff's motion to
4 compel further responses and production on Request for Production Nos. 3 and 4 and
5 Interrogatory Nos. 4, 8, 9, 10, 11 and 12:

6 **PLAINTIFF'S INTRODUCTION**

7 Plaintiff Alton Harding sues defendant Macy's West Stores, Inc. (Macy's) for
8 compensatory, statutory treble damages and punitive damages for racial profiling for
9 the false and wrongful accusation by a Macy's employee that he was a thief. [Cpt.
10 ¶¶ 4-6] Plaintiff was shopping at Macy's when he was stopped by a security guard
11 and accused of theft. The guard indicated he had been specifically contacted by loss
12 prevention to stop him and bring him back to the loss prevention department.
13 Plaintiff was then marched through the store to loss prevention. The true facts were
14 the guard was never advised by loss prevention to stop plaintiff who was
15 subsequently told by this individual he was not actually the correct suspect. As
16 plaintiff was leaving the store, he advised a manager of what had occurred. The
17 manager acknowledged for all intents and purposes he was racially profiled since he
18 was the only African-American in the store.

19 There are 2 subjects of discovery involved in this dispute. First, plaintiff seeks
20 information regarding other acts of racial profiling by Macy's. Second, plaintiff asks
21 Macy's for its supporting facts and evidence for its affirmative defenses—all sixteen
22 of them.

23 Macy's asserts all manner of objections to the racial profiling information
24 requested, including the assertion that the information is irrelevant. The relevance of
25 the racial profiling by Macy's is obvious. For treble and punitive damages, plaintiff
26 must show reprehensible conduct. That Macy's is a recidivist racial profiler is quite
27 relevant to prove reprehensible conduct for treble and punitive damages. Plaintiff is
28 aware of other cases in which Macy's has been accused of racial profiling. See e.g.,

1 *Wallace v. Federated Dep't Stores, Inc.*, 214 F. App'x 142, 145 (3d Cir. 2007)
 2 [allegation of racial profiling by employee who cited "a Macy's training session on
 3 'eliminating racial profiling by store loss prevention detectives'"]; *Allen v. Macy's*,
 4 USDC Missouri, 16-cv-03044-BP [Exhibit A]; *People v. Macy's East Inc.*, USDC
 5 SD NY, 05-cv-00369 [Exhibit B]; *Brown v. Macy's*, USDC SD NY, 13-cv-08092-
 6 LGS [Exhibit C]; *Cesar v. Macy's*, USDC ND Cal., 16-cv-04387-JCS [Exhibit D];
 7 *Petigny v. Macy's*, USDC SD Fla., 13-cv-21020-CMA [Exhibit E]. So, from New
 8 York to Florida to Missouri to California, Macy's has been accused of racial
 9 profiling, which has apparently been an unresolved problem for many years. In point
 10 of fact, in *People v. Macy's East*, Macy's agreed in 2005 to pay the state of New
 11 York a fine of \$600,000.00 and establish a security monitor and train employees to
 12 prevent racial profiling. [Exhibit F, pp. 5-6, 11-13]¹ Plaintiff is entitled to discovery
 13 on the other claims of racial profiling asserted against Macy's to seek admissible
 14 evidence for his claims for treble and punitive damages, as discussed more fully
 15 below.

16 On the issue of affirmative defenses, Macy's has provided virtually no facts
 17 and evidence that support them. Macy's asserts it is entitled to allege affirmative
 18 defense without supporting evidence. That is simply not true.

19 **DEFENDANT'S INTRODUCTION**

20 In this lawsuit regarding allegations of racial profiling at a Macy West Stores,
 21 Inc. ("Defendant" or "Macy's West") location in Costa Mesa, California, the Court's
 22 intervention has become necessary to resolve a discovery dispute² relating to the
 23

24 ¹ Further, plaintiff is informed that Macy's was again fined in 2014 by the state of
 25 New York for racial profiling complaints of 18 store customers, this time in the
 26 amount of \$650,000. See http://www.nytimes.com/2014/08/20/nyregion/macys-to-pay-650000-to-resolve-bias-inquiry.html?_r=0.

27 ² As a preliminary matter, Defendant respectfully objects to the use of this joint
 28 stipulation procedure without properly following C.D. Cal. Local Rule 37-1. Although Defendant requested that Plaintiff's counsel hold an in-person meet-and-

1 relevance and discoverability of prior complaints of racial profiling in Macy's stores
2 across the United States, generally, without limitation as to time or location. That is,
3 to the extent that Defendant can make out Plaintiff's definition of "racial profiling,"
4 which Plaintiff's counsel repeatedly refused to define during meet-and-confer
5 attempts and, eventually, resulted in the overbroad definition of "**any incident in**
6 **which someone was treated differently in any manner based on their race.**"
7 (Ex. P.)³ Importantly, the Complaint involves a single instance where Plaintiff
8 allegedly was told that because he was the only African-American individual in the
9 store, he was assumed to be the culprit behind a theft. (Doc. No. 1, Ex. A, Compl.
10 ¶¶ 5-8.) However, Plaintiff's counsel has refused to state that the scope of the
11 discovery was limited to similar instances to Plaintiff's allegations in the Complaint,
12 and instead remarked that the scope was "**anything.**" (Cook Decl., Ex. 1.)
13 Accordingly, the scope appears to encompass entirely irrelevant matters, including
14 any purported allegations of employment discrimination, even though this is not an
15 employment discrimination case.

16 Notwithstanding the patent overbreadth of such a term and the clear lack of
17 relevance or proportionality to the instant case, Plaintiff's major problem with his
18 discovery, which gives rise to Defendant's request for a Protective Order, *infra*, is
19 Plaintiff's insistence on treating Macy's as a consolidated entity even though
20 Plaintiff, presumably for strategic reasons, has only sued Defendant Macy's West
21 rather than Macy's, Inc. or even Macy's West's direct parent corporation (Macy's
22 Retail Holdings, Inc., itself owned by Macy's, Inc.). If Macy's, Inc. and/or Macy's
23 Retail Holdings, Inc. were parties to this action, Plaintiff's arguments would have
24 more support, but Plaintiff lumps all the various entities together and attempts to

25
26 confer pursuant to this rule, Plaintiff's counsel refused in a written letter by
27 remarking "that's why we have telephones." (Exs. M-N.)

28 ³ For purposes of this motion, Plaintiff relies on exhibits using letters (*i.e.*,
"Exhibit A"); accordingly, for the Court's convenience, any exhibits relied upon by
Defendant Macy's West are numbered (*i.e.*, "Exhibit 1").

1 hold Defendant Macy's West liable for the acts of a separate entity operating stores
 2 in New York, even though Defendant has repeatedly advised Plaintiff that Macy's
 3 West—the sole Macy's-related entity in this action—only operates stores in the
 4 Pacific and Southwestern United States, and has never operated a single store in New
 5 York. Unfortunately for Plaintiff, the time to amend the Complaint to add any parent
 6 company—whether it be Macy's, Inc. or Macy's Retail Holdings, Inc.—as a Doe
 7 defendant passed on **November 2, 2016**, such that Plaintiff is limited by both his
 8 Complaint and by law to Macy's West's geographic region.

9 Perhaps recognizing this fatal flaw with its discovery, Plaintiff's motion treats
 10 "Macy's" as one giant consolidated entity, but Defendant's evidence, in the form of
 11 the Declaration of Ann Munson Steines, explains that this is false. (Cook Decl.,
 12 Ex. 2.) In actuality, Defendant Macy's West, which is the sole Macy's-related party
 13 in this action, is a subsidiary of Macy's Retail Holdings, Inc.—itself a subsidiary of
 14 Macy's, Inc.—but does not operate any stores in New York, Florida, Illinois, or
 15 Missouri—all of which are the states where Plaintiff claims that Macy's has an
 16 ongoing issue with racial profiling.⁴ The sole Macy's West state where Plaintiff
 17 identifies a single racial profiling claim is California—where Plaintiff identified just
 18 one case, filed this year—but **that case was filed after Defendant served its**
 19 **discovery responses in this case, and involved events post-dating the events of**
 20 **this case**. (*Compare* Ex. D ¶ 8 [August 3, 2015 incident date] *with* Doc. No. 1, Ex.
 21 A, Compl. ¶ 5 [December 4, 2014 incident date].)

22 On or about November 4, 2016, Defendant advised Plaintiff's counsel that the
 23 Bloomberg information was incorrect and that Defendant had never owned or

24 ⁴ Remarkably, Plaintiff attempts to rely on incompetent hearsay from Bloomberg, a
 25 website unaffiliated with Macy's, to claim that Macy's West operates stores in New
 26 York, Illinois, and Florida. Notwithstanding Defendant's hearsay objection pursuant
 27 to Fed. R. Evid. 801 *et seq.*, the attached Declaration of Ann Munson Steines, an
 28 actual Macy's employee, establishes that Macy's West only operates stores in the
 Pacific and Southwestern United States, and has never operated a single store in New
 York, Illinois, Florida, or Missouri. (Cook Decl., Ex. 2.)

1 operated a single Macy's store in New York, Florida, or Illinois. In response,
2 Plaintiff's counsel stated that the information changed nothing for purposes of this
3 Joint Stipulation because Macy's West is a subsidiary of Macy's itself⁵ and Macy's
4 has a "corporate policy apparently applicable to all Macy's stores posted on the
5 website specifically concerning racial profiling." (Cook Decl., Ex. 3.) This
6 representation clearly is at odds with Plaintiff's briefing *infra*, which states that
7 Plaintiff's proposed time limit of 15 years is not overbroad precisely because Macy's
8 West owns and operates stores in New York and there have been complaints in that
9 state going back 15 years. Clearly, Defendant's objections to Plaintiff's discovery as
10 overbroad, irrelevant, and not proportional to the needs of this case are well-taken
11 given Plaintiff's fixation on discovery relating to non-party entities, and the Court
12 should enter a Protective Order prohibiting further discovery into these irrelevant
13 events involving nonparties to this litigation.⁶

14 Second, regarding the issue of affirmative defenses, Macy's West has
15 identified those documents to Plaintiff in the form of documents that Plaintiff
16 previously produced to Macy's. Consistent with Fed. R. Civ. P. 33(d)(1), a party
17 may identify categories of documents where the information to answer an
18 Interrogatory may be found, so long as the burden is equal to both parties. Here,
19

20 ⁵ Even assuming that Macy's, Inc. and/or Macy's Retail Holdings, Inc. were
21 defendants to this action, the fact of the matter is that these companies also own and
22 operate non-Macy's brand stores, such as Bloomingdale's. By Plaintiff's counsel's
23 logic, he would be entitled to those stores' racial profiling data because
24 Bloomingdale's is a subsidiary of Macy's. For this reason, Defendant's objections
25 are clearly well taken.

26 ⁶ Defendant notes that Plaintiff's counsel has declared his belief that Defendant had
27 agreed to produce documents, subject to a protective order; this is not remotely true.
28 Rather, as noted by another exhibit, Defendant simply agreed that if the scope of the
discovery was sufficiently narrowed from its considerably overbroad phrasing, at
that point Defendant would produce the documents subject to a protective order.
(Exs. L-M.) Plaintiff's counsel never agreed to reduce the scope, as shown by
Defendant's briefing and exhibits, such that no agreement ever came to fruition.

1 Macy's West did precisely this, by directing Plaintiff's attention to his previously
2 produced financial and medical records. If Plaintiff believes that this information is
3 insufficient, Plaintiff is fully within his rights to seek partial summary judgment of
4 the defenses at issue, but Macy's West submits that this would be premature given
5 that Plaintiff's deposition has yet to be taken in this case.

6 Lastly, Plaintiff seeks a windfall of tens of thousands of dollars in sanctions
7 for filing the instant motion despite the obvious good-faith discovery dispute
8 between the parties. The Court should deny Plaintiff's meritless sanctions request,
9 given that Rule 37(a)(5) does not authorize a sanctions award as a matter of course if
10 Plaintiff prevails on the motion; rather, sanctions are precluded if the motion was
11 "substantially justified" or "other circumstances make an award of expenses unjust."
12 Pursuant to this rule, "[t]he court will not order monetary or other sanctions when it
13 finds that a position was substantially justified in that the parties had a genuine
14 dispute on matters on which reasonable people could differ as to the appropriate
15 outcome." *See, e.g., Roberts v. Clark Cnty. Sch. Dist.*, 312 F.R.D. 594, 609
16 (D. Nev. 2016); *see also Reygo Pacific Corp. v. Johnston Pump Co.*, 680 F.2d 647,
17 649 (9th Cir. 1982) ("A request for discovery is 'substantially justified' under the rule
18 if reasonable people could differ as to whether the party requested must comply.").
19 Here, substantial justification is present because the weight of authority indicates that
20 Defendant's objections are well-taken and will prohibit discovery on the matters that
21 are the subject of the instant motion, particularly with regard to the discovery
22 targeting matters that are factually distinct from this case and targeting non-party
23 entities.

24 As such, the Court should deny Plaintiff's meritless motion to compel and
25 further deny Plaintiff's meritless request for sanctions, both with prejudice.
26
27
28

1 **SPECIFIC DISCOVERY IN ISSUE**

2 **REQUEST FOR PRODUCTION NO.3:**

3 Any and all prior claims against defendant which allege racial profiling, not
4 limited to California.

5 **FURTHER RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

6 Responding Party restates and reaffirms all previously asserted objections.
7 This request is vague, ambiguous, overly broad and unduly burdensome as to time
8 and scope. Furthermore, Asking Party's request contains no terms of limitation as to
9 scope or time. As phrased, this request is a fishing expedition that is irrelevant to this
10 claim and for the purpose of harassing Responding Party. Further, this Request seeks
11 production of documents protected by the attorney work-product privilege, attorney
12 client privilege, and in anticipation of litigation. See: *Scripps Health v. Superior*
13 *Court* (2003) 109 Cal.App.4th 529; *Nacht & Lewis Architects, Inc. v. Superior Court*
14 (1996) 47 Cal.App. 4th 214. This request seeks confidential and private information
15 that, if disclosed, would violate the privacy rights of third parties unrelated to this
16 action. Additionally, this request seeks production of confidential settlement
17 documents that are inadmissible under Federal Rule of Evidence § 408.

18 Without waiving said objection, Responding Party responds as follows: With
19 respect to past incident of "racial profiling" at the subject location, no documents
20 exist responsive to this request because there are no other incidents of racial profiling
21 at this subject location other than this instant lawsuit for a period of 2009 to present.

22
23 **PLAINTIFF'S ARGUMENT FOR FURTHER RESPONSE TO REQUEST**
24 **FOR PRODUCTION NO. 3**

25 The requests asks for claims of racial profiling alleged against Macy's. During
26 the meet and confer process, plaintiff limited the request for claims to 15 years.

27 Macy's asserts boilerplate objections that have no relationship to the request.
28 How are claims against Macy's confidential? How are claims against Macy's

1 privileged? Macy's simply does not want to reveal its long history of racial profiling
2 and attempts to hide behind the irrelevant objections and asserts the old saw that the
3 request is a fishing expedition. "An opponent's characterization of a discovery
4 request as a 'fishing expedition' should not, however, prevent discovery of relevant
5 and potentially admissible evidence in the possession, custody or control of the
6 opposing parties. The requesting party is not required to demonstrate in advance that
7 the sought-after information will ultimately prove his case or even that it will be
8 admissible at trial. He is only required to make a threshold showing that the
9 discovery is relevant and is calculated to lead to the discovery of admissible
10 evidence." *Voggenthaler v. Md. Square, LLC*, 2011 U.S. Dist. LEXIS 5046, at *35
11 (D. Nev. Jan. 13, 2011).

12 Claims of racial profiling against Macy's are relevant and likely admissible at
13 trial on the issue of treble and punitive damages.⁷ In *BMW of N. Am. v. Gore*, 517
14 U.S. 559, 576-77 (1996), the Supreme Court said:

15 '[E]vidence that a defendant has repeatedly engaged in prohibited
16 conduct while knowing or suspecting that it was unlawful would
17 provide relevant support for an argument that strong medicine is
18 required to cure the defendant's disrespect for the law. See *id.*, at 462, n.
19 28. Our holdings that a recidivist may be punished more severely than a
20 first offender recognize that repeated misconduct is more reprehensible
21 than an individual instance of malfeasance. See *Gryger v. Burke*, 334
22 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948)."

23 In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003), the
24 Supreme Court repeated the statement of the Court in *Gore* and added:

25 "Although 'our holdings that a recidivist may be punished more

26 ⁷ "Treble damages are punitive in nature". *Imperial Merch. Services, Inc. v. Hunt*, 47
27 Cal. 4th 381, 394 (2009). Under Civil Code § 52, treble damages are in the
28 discretion of the trier of fact, who should be permitted to consider all evidence of
reprehensible conduct of Macy's to justify the penalty.

1 severely than a first offender recognize that repeated misconduct is
2 more reprehensible than an individual instance of malfeasance,' *Gore*,
3 *supra*, at 577, in the context of civil actions courts must ensure the
4 conduct in question replicates the prior transgressions. [Citation.]”

5 The law permits this plaintiff to present evidence of other acts of racial
6 profiling. In doing so, plaintiff must show similarity between the other acts and this
7 case. Plaintiff can only do so if he secures the documents on the other claims. Most
8 assuredly, Macy's has the other claims. The other claims are very relevant.

9 To the extent that treble and punitive damages in this case may be governed by
10 state law, the California Supreme Court agrees with *State Farm* and *Gore* regarding
11 recidivists. In *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191, 1196-97 (2005), the
12 Supreme Court held:

13 “In reducing the punitives to a small multiple of the relatively modest
14 compensatory damages award, however, the Court of Appeal apparently
15 failed to adequately consider that Ford's fraud was more reprehensible
16 because it was part of a repeated corporate practice rather than an
17 isolated incident. For this reason, we reverse the Court of Appeal's
18 judgment and remand for that court to conduct again the independent
19 due process review required under *State Farm Mut. Auto Ins. Co. v.*
20 *Campbell* (2003) 538 U.S. 408 [155 L. Ed. 2d 585, 123 S. Ct. 1513]
21 (*State Farm*) and *BMW of North America v. Gore* (1996) 517 U.S. 559
22 [134 L. Ed. 2d 809, 116 S. Ct. 1589] (*BMW*).

23 The other claims of racial profiling against Macy's are quite relevant to the
24 issues of this case. Macy's attempt to limit the other claims to the store in issue is
25 inappropriate as Macy's West Stores, Inc. “operates stores in New York, New York;
26
27
28

1 San Francisco, California; Miami, Florida; and Chicago, Illinois.”⁸ The company is a
 2 subsidiary of Macy's, Inc. See footnote 3 cite. Given the claims of which plaintiff
 3 knows arising in New York, Florida, Missouri and California, the racial profiling of
 4 Macy's is a corporate practice.

5 And, the request for 15 years is reasonable. The 2005 fine, requirement for a
 6 security monitor and training in *People v. Macy's* and the subsequent 2014 fine by
 7 the state of New York for apparently the very same conduct prove Macy's has had a
 8 long term problem with racial profiling. Plaintiff should be entitled to learn about all
 9 of the racial profiling claims against Macy's to prove up the punitive damages in this
 10 case. Given the recidivism, “[S]trong medicine is required to cure the defendant's
 11 disrespect for the law”. *Gore, supra*.

12 Macy's also asserts an objection based on Federal Rule of Evidence § 408,
 13 that is, preclusion of the introduction of a compromise at trial “either to prove or
 14 disprove the validity or amount of a disputed claim or to impeach by a prior
 15 inconsistent statement or a contradiction”. The objection is unfounded at the
 16 discovery phase. Moreover, the evidence of settlements in other cases is often
 17 admissible, even when the settlements are confidential. Citing public policy
 18 concerns, a number of courts have held that such confidentiality provisions will not
 19 be utilized as a shield to obstruct the discovery process. *Young v. State Farm Mutual*
 20 *Automobile Insurance Co.* (S.D.W.V. 1996) 169 F.R.D. 72, 79; *City of Hartford v.*
 21 *Chase* (2nd Cir.1991) 942 F.2d 130, 136; See also *Bank of America National Trust &*
 22 *Savings Ass'n v. Hotel Rittenhouse Associates* (3d Cir. 1986) 800 F.2d 339. This is
 23 particularly true when confidentiality provisions may have the effect of silencing
 24 witnesses with a settlement agreement where the facts of one controversy are
 25 relevant to another. *Nestor v. Posner-Gerstenhaber* (Fla. Dist. Ct. App. 3d Dist.

26
 27 ⁸

28 <http://www.bloomberg.com/Research/stocks/private/snapshot.asp?privcapId=25664292>.

2003) 857 So. 2d 953, 955 (“Contractual confidentiality agreements, however, cannot be used to adversely interfere with the ability of nonparties to pursue discovery in support of their case.”) See *Scott v. Nelson* (Fla. 1st DCA 1997) 697 So. 2d 1300. (“Settlement agreements which suppress evidence violate the greater public policy”).

Macy’s should be ordered to produce the documents setting forth the claims made against Macy’s for racial profiling for the last 15 years wherever those claims arose.

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR
FURTHER RESPONSE TO REQUEST FOR PRODUCTION NO. 3;
REQUEST FOR PROTECTIVE ORDER**

I. Argument re: Opposition

As stated, Request for Production No. 3 is overbroad on its face because it lacks any time limitation whatsoever. See, e.g., *Quezada v. Lindsey*, 2014 U.S. Dist. LEXIS 154102, *11 (E.D. Cal. Oct. 30, 2014) (“Plaintiff’s motion to compel a further response to this request is DENIED. First, Plaintiff’s request is overbroad as to time, as it is not limited to the relevant time period relative to the allegations in the complaint.”). Further, even with a 15-year time limitation, the request is clearly overbroad as to time; to the extent Defendant can determine Plaintiff’s intended meaning of “racial profiling,” the overbreadth is obvious because Plaintiff’s counsel expressly declined to limit “racial profiling” to similar instances to Plaintiff’s allegations, and instead stated that “**anything**” was at issue. This would appear to include any purported allegations of employment discrimination, even though this is not an employment discrimination case. What’s more, Plaintiff’s attempts to argue that Defendant is prone to “recidivism” are unavailing because they involve ancillary entities who are not defendants in this case and who are wholly separate from

1 Macy's West, the actual defendant in this case.

2 For one, as noted above, the definition of "racial profiling" offered by Plaintiff
3 is extremely overbroad and is not limited to events that are similar to Plaintiff's
4 allegations: rather, as Plaintiff's counsel stated, the limitation is to **"anything"** where
5 someone was treated differently because of their race. This admission by Plaintiff's
6 counsel is fatal to the instant motion to compel, as the authorities upon which
7 Plaintiff relies do not support this overreaching definition of relevance in discovery.
8 Rather, they stand for the proposition that for purposes of punitive damages, a
9 showing of relevance requires that the conduct be similar to the alleged conduct in
10 the Complaint.

11 Indeed, Plaintiff relies heavily on *State Farm Mut. Auto. Ins. Co. v. Campbell*,
12 538 U.S. 408 (2003) to argue that evidence of Defendant's recidivism is relevant to
13 punitive damages, but Plaintiff's reliance on *Campbell* is unavailing due to the clear
14 dissimilarity of the acts at issue in this case as opposed to the far broader definition
15 offered by Plaintiff's counsel, such that Plaintiff's discovery seeks evidence that is
16 not relevant to punitive damages. The Supreme Court strongly cautioned that "in the
17 context of civil actions courts must ensure the conduct in question replicates the prior
18 transgressions." *Id.* at 423. "A defendant's dissimilar acts, independent from the acts
19 upon which liability was premised, may not serve as the basis for punitive damages.
20 A defendant should be punished for the conduct that harmed the plaintiff, not for
21 being an unsavory individual or business." *Id.* at 422-23. As the Court noted, "[t]he
22 reprehensibility guidepost does not permit courts to expand the scope of the case so
23 that a defendant may be punished for any malfeasance, which in this case extended
24 for a 20-year period," and held that because the plaintiffs had shown no conduct by
25 the defendant "similar to that which harmed them, the conduct that harmed them is
26 the only conduct relevant to the reprehensibility analysis." *Id.* at 424. The
27 imposition of punitive damages based on dissimilar acts "creates the possibility of
28

1 multiple punitive damages awards for the same conduct; for in the usual case
2 nonparties are not bound by the judgment some other plaintiff obtains.” *Id.* at 423.

3 Here, Plaintiff’s motion should be denied and Defendant’s objections should
4 stand, as the discovery targets dissimilar events that have no relevance for purposes
5 of punitive damages. If Plaintiff’s counsel had limited the discovery at issue to
6 events that were factually similar to Plaintiff’s allegations, then this discovery would
7 not be overbroad, **but Plaintiff’s counsel expressly declined to limit the discovery**
8 **in such a manner.** As phrased, the scope of this discovery appears to encompass
9 purported allegations of employment discrimination, even though this is not an
10 employment discrimination case. Likewise, the Complaint discusses events dealing
11 with a lone Macy’s Sales Clerk allegedly profiling Plaintiff, whereas the civil actions
12 that Plaintiff attaches as support for his Motion to Compel all dealt with loss
13 prevention, or even the local police, allegedly profiling the plaintiffs. (*See, e.g.,*
14 Ex. A ¶¶ 2-9; Ex. B ¶¶ 1, 12; Ex. C ¶¶ 12-13; Ex. D ¶¶ 8-12.) Absent any limitation
15 on the discovery, the only logical conclusion is that this discovery is a classic
16 “fishing expedition” that must be disallowed.

17 Further, even assuming Plaintiff could show that similar events were at issue,
18 the other major problem with Plaintiff’s Request and Interrogatories that ask for
19 information relating to racial profiling is the focus on non-parties that are not the
20 subject of this litigation, thereby further demonstrating the total lack of relevance of
21 the discovery to the facts of this case and the undue burden to Defendant Macy’s
22 West in responding based on a national scale. As discussed in the Declaration of
23 Ann Munson Steines, Defendant Macy’s West has never owned or operated any
24 stores in New York, Florida, Illinois, or Missouri, thereby rendering Plaintiff’s heavy
25 reliance on events in those states unavailing. (Cook Decl., Ex. 2.) Plaintiff’s attempt
26 to rely on an incompetent, unauthenticated hearsay statement from a website that is
27 not even Macy’s-affiliated should be disregarded under Defendant’s objection to that
28

1 inaccurate and inadmissible hearsay statement pursuant to Fed. R. Evid. 801 *et seq.*

2 Tellingly, when Plaintiff's counsel was informed that events involving New
3 York stores were completely irrelevant because they are beyond Defendant's control
4 and involved a separate entity, Plaintiff's counsel moved the goalposts by suggesting
5 that the discovery was still relevant because there is a national Macy's policy on
6 racial profiling. Defendant submits that **another entity's** failure to comply with the
7 alleged policy has no bearing on **Defendant's** compliance with the policy. Macy's
8 East is not a defendant in this action, nor is Macy's, Inc. or Macy's Retail Holdings,
9 Inc. More importantly, Plaintiff's Complaint is silent altogether as to the existence
10 of such a national policy—not even implying such a policy exists and was violated—
11 and instead refers only to events taking place in the single Macy's West store at
12 issue. (Doc. No. 1, Ex. A, Compl. ¶¶ 5-8.) In contrast, one of Plaintiff's complaints
13 relied upon as an exhibit references the policy at length. (*See* Ex. A ¶¶ 2-9.)

14 Unsurprisingly, the law disagrees with Plaintiff's view of discovery because
15 the sole defendant in this case is a **subsidiary**, rather than the parent company: the
16 cases treating subsidiaries and the parent company as a consolidated entity for
17 purposes of discovery are cases in which the parent company was a named
18 defendant, if not the sole named defendant.⁹ Likewise, the law disagrees due to the
19 absence in Plaintiff's Complaint of any reference to violations of an alleged
20 "national policy" held by Macy's, or even any allusions to that effect: rather, the
21

22 ⁹ Plaintiff appears to take the position that the corporate veil must be pierced, but
23 has only named one entity, Macy's West, as a defendant. Plaintiff fails to provide
24 any allegations that Defendant has not observed corporate formalities or acted as
25 though the other Macy's subsidiary entities constitute its alter-egos. In fact, the
26 alter-ego issue is not posed by the Complaint, which only references Defendant
27 Macy's West. *See, e.g., Electromatic (PTY), Ltd. v. Rad-O-Lite of Philadelphia,*
28 *Inc.*, 90 F.R.D. 182, 183-84 (E.D. Pa. 1981) (discovery was relevant to corporate
alter-ego claim because plaintiff showed basis for separate entities being single entity
by pointing to specific transactions where the purportedly separate entities had paid
the other entities' bills without regard to the corporate form).

1 Complaint simply refers to events taking place at one Macy's store and appears to
2 fault just that store's personnel rather than a generalized corporate policy. (*See* Doc.
3 No. 1, Ex. A, Compl. ¶¶ 5-8.)

4 For example, the instant case is wholly unlike *Gutierrez v. Johnson &*
5 *Johnson, Inc.*, 2002 U.S. Dist. LEXIS 15418, *22-*23 (D.N.J. Aug. 12, 2002),
6 wherein the defendant's request for a protective order limiting discovery to the
7 plaintiff's former employer entities was denied precisely because the parent
8 company of those entities was the sole named defendant. As the court explained,
9 "Plaintiffs have brought a class action against Johnson & Johnson, Inc., not against
10 Ethicon, Inc. and/ or Johnson & Johnson Services, Inc. It bears repeating that the
11 defendant in this matter is the parent company, Johnson & Johnson, Inc., and that
12 what is at issue are policies, practices and procedures implemented by, or at the
13 direction of, or in the absence of any direction whatsoever, from, the parent company
14 Johnson & Johnson, Inc;. Therefore documents in the possession of the named
15 defendant are relevant, absent a clear and convincing showing to the contrary." *See*
16 *also Flores v. Bank of Am.*, 2012 U.S. Dist. LEXIS 182393, *4-*5 (S.D. Cal. Dec.
17 27, 2012) ("[T]he only purpose of Plaintiffs' interrogatories in issue in the Joint
18 Statement is to allow Plaintiffs to search for other customers of Defendants with
19 claims similar to those of the Plaintiffs in *Flores* and *Jones*, without any factual
20 connection to the Plaintiffs in *Flores* and *Jones* other than that they are Defendants'
21 customers who did not receive loan modifications. In the Court's view, the type of
22 discovery sought by Plaintiffs constitutes a 'fishing expedition' which would be
23 unduly burdensome for Defendants to further respond.").

24 **II. Request for Protective Order**

25 Clearly, given Plaintiff's insistence on pursuing discovery from Defendant
26 Macy's West that relates to events that are not factually similar to the allegations in
27 the Complaint, and further given Plaintiff's focus on nonparty entities and their
28

1 compliance with an alleged national policy—despite these separate nonparty entities’
 2 obvious lack of connection to **Defendant’s** compliance with the same policy—
 3 a Protective Order is warranted that would forbid or limit further discovery into:
 4 (1) factually dissimilar acts and omissions; and (2) any acts and omissions by
 5 separate entities that are not defendants to this action. **Defendant hereby makes a**
 6 **formal request for such Protective Order pursuant to Fed. R. Civ. P. 26(c), on**
 7 **the basis that the discovery’s lack of relevance to recidivism or punitive**
 8 **damages—which are Plaintiff’s sole offered bases for relevance—provides the**
 9 **necessary good cause.**

10 “Pursuant to Federal Rule of Civil Procedure 26(c)(1), ‘[t]he court may, for
 11 good cause, issue an order to protect a party or person from annoyance,
 12 embarrassment, oppression, or undue burden or expense.’ The party seeking the
 13 protective order has the burden to show good cause by demonstrating harm or
 14 prejudice that will result from the discovery.” *Dairy v. Dairy Emples. Union Local*
 15 *No. 17 Christian Labor Ass’n*, 153 F.Supp.3d 1217, 1259 (E.D. Cal. 2015).
 16 Importantly, “a showing of irrelevancy of proposed discovery can satisfy the ‘good
 17 cause’ requirement of Rule 26(c).” *Smith v. Dowson*, 158 F.R.D. 138, 140 (D. Minn.
 18 1994); *see also Carrera v. First Am. Home Buyers Prot. Co.*, 2014 U.S. Dist. LEXIS
 19 101064 at *2-4 (S.D. Cal. July 23, 2014); *Navel Orange Administrative Committee v.*
 20 *Exeter Orange Co.*, 722 F.2d 449, 454 (9th Cir. 1983) (“When Exeter sought to
 21 depose NOAC’s general manager regarding the factual basis of Exeter’s affirmative
 22 defenses, NOAC sought and was granted a Fed. R. Civ. P. 26(c) protective order
 23 barring Exeter from discovering matters related to those defenses. The court’s
 24 reasoning was simple: if the affirmative defenses are not cognizable in an
 25 enforcement proceeding, discovery relating to those defenses is irrelevant and
 26 immaterial.”).

27 In light of the briefing above that shows the clear lack of relevance of the
 28

1 discovery at issue to the facts of this case, Defendant hereby requests that the Court
2 enter a Protective Order limiting any discovery regarding “racial profiling” to events
3 that are similar to Plaintiff’s allegations in the Complaint and to events involving
4 stores under Defendant Macy’s West’s control: *i.e.*, stores in the states identified in
5 the Declaration of Ann Munson Steines.

6
7 **REQUEST FOR PRODUCTION NO. 4.:**

8 Any and all documents that will support any of your affirmative defenses
9 raised in your Answer to the Complaint.

10 **FURTHER RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

11 Responding Party restates and reaffirms all previously asserted objections.
12 Objection, this request has been asked and answered in Responding Party's response
13 to Special Interrogatory No. 4. Of Plaintiff’s Special interrogatories (Set One). This
14 Request invades the attorney work-product privilege in that it requires a disclosure of
15 the impressions, conclusions and opinions of Responding Party's counsel. Moreover,
16 this Request presupposes that Responding Party has the burden of proving a denial of
17 an allegation contained in Plaintiff’s complaint, a proposition which is contrary to
18 existing law. Under existing law, Plaintiff has the burden of proving each and every
19 fact necessary to sustain his recovery against this Responding Party. Responding
20 Party is entitled to deny the unverified allegations of Plaintiff s complaint generally
21 and to put Plaintiff to his proof without specifying what facts or evidence this
22 Responding Party may choose to offer into evidence in response to the evidence
23 offered by Plaintiff.

24 To the extent that this Request seeks a statement of the special or affirmative
25 defenses, the pleadings filed by Responding Party state those affirmative defenses
26 and special defenses and it is burdensome and oppressive to Responding Party to
27 require a restatement of those pleaded facts.

28 The acts and discovery in this matter are yet to be concluded and, as a result, a

1 comprehensive response to this Request is not yet available. However, in the spirit of
2 discovery, all affirmative defenses as alleged by Responding Party are made for the
3 specific purpose of preserving the rights of said Responding Party and will be
4 maintained until such time as discovery has been concluded.

5
6 **PLAINTIFF’S ARGUMENT FOR FURTHER RESPONSE TO REQUEST**
7 **FOR PRODUCTION NO. 4**

8 In an apparent boilerplate response, Macy’s contends that it is entitled to deny
9 plaintiff’s allegations and should not be required to support such denials with
10 evidence. While that is not so, the request does not seek information respecting the
11 denial of plaintiff’s allegations. Rather, the request seeks evidence supporting the
12 affirmative defenses. As to evidence supporting the affirmative defenses, Macy’s
13 appears to contend that the evidence to support its 16 affirmative defenses is work
14 product and that it is entitled to assert affirmative defenses without supporting
15 evidence. Neither ground is true.

16 The work-product doctrine protects documents and tangible things that have
17 been prepared by or for a party or his representative in anticipation of litigation or for
18 trial. FRCP, Rule 26(b)(3). The work product doctrine protects against the disclosure
19 of documents and tangible things “prepared in anticipation of litigation or for trial by
20 or for another party or by or for that other party's representative. . . .” As noted in
21 1970 by the Advisory Committee on Rules, “Subdivision (b)(3) reflects the trend of
22 the cases by requiring a special showing, not merely as to materials prepared by an
23 attorney, but also as to materials prepared in anticipation of litigation or preparation
24 for trial by or for a party or any representative acting on his behalf.” ““The burden of
25 establishing protection of materials as work product is on the proponent, and it must
26 be specifically raised and demonstrated rather than asserted in a blanket
27 fashion.’[Citations.]” *Green v. Baca*, 226 F.R.D. 624, 652 (C.D. Cal. 2005). Macy’s
28 has not asserted in its objection or during the meet and confer process that any of the

documents sought by plaintiff were prepared by or for counsel for Macy's. Rather, it has asserted a blanket objection. The work product doctrine does not apply.

In addition, there is no statutory right to assert affirmative defenses for which the defendant has utterly no facts to support them when the answer is filed. As the requirements of Rule 11 apply to the assertion of an affirmative defense, affirmative defenses should be limited only to those supported by the law and the evidence. *Gargin v. Morrell*, 133 F.R.D. 504, 506 (E.D. Mich. 1991) (explaining that affirmative defenses "not then and there reasonably supported in fact and law" violate Rule 11); *Ganley v. Cty. of San Mateo*, 2007 U.S. Dist. LEXIS 26467, at *8 (N.D. Cal. Mar. 22, 2007) (Rule 11 requires defendant's counsel to allege only those affirmative defenses that are supported by existing law and the evidence); *Gomez v. J. Jacobo Farm Labor Contr., Inc.*, 2016 U.S. Dist. LEXIS 66922, at *9 n.2 (E.D. Cal. May 19, 2016) ("allowing affirmative defenses pled without any investigation into the underlying factual basis implicates Rule 11 concerns").

Macy's cannot be permitted to hide behind the unsupported response that "all affirmative defenses as alleged by Responding Party are made for the specific purpose of preserving the rights of said Responding Party and will be maintained until such time as discovery has been concluded." Macy's has no right to assert affirmative defenses for which it has no evidence. Macy's should be required to respond that it has no documents to support any of its affirmative defenses so that plaintiff may move for partial summary judgment to eliminate the defenses.

DEFENDANT'S OPPOSITION TO PLAINTIFF'S ARGUMENT FOR FURTHER RESPONSE TO REQUEST FOR PRODUCTION NO. 4

First and foremost, Defendant submits that it thought this issue was settled after meet-and-confer discussions with Plaintiff's counsel, wherein Defendant advised that all documents at issue were already identified in the discovery responses and no further responsive documents existed. (See Exhibit 4) Pursuant to those

1 discussions, Defendant submitted a supplemental response to Request for Production
2 No. 4 that identified the same categories of documents stated below in response to
3 Interrogatory No. 4. (Ex. 5.) For unexplained reasons, Plaintiff's briefing attempts
4 to compel a further response to Defendant's prior discovery responses, even though
5 they were amended and supplemented to identify categories of documents.

6 Defendant submits that it properly identified categories of documents where
7 the responsive information could be found, in response to Request for Production
8 No. 4 (and Interrogatory No. 4, as discussed *infra*). Pursuant to Fed. R. Civ. P.
9 33(d)(1), a party may identify categories of documents where the information to
10 answer an Interrogatory may be found, so long as the burden is equal to both parties
11 to locate the information from the documents. Here, Macy's West did precisely this,
12 by directing Plaintiff's attention to his previously produced financial and medical
13 records. If Plaintiff believes that this information is insufficient, Plaintiff is fully
14 within his rights to seek partial summary judgment of the defenses at issue, but
15 Macy's West submits that this would be premature given that Plaintiff's deposition
16 has yet to be taken in this case despite numerous attempts by Defendant to arrange
17 such deposition, and Defendant reasonably anticipates that further facts in support of
18 its affirmative defenses will be disclosed during such deposition, consistent with
19 Fed. R. Civ. P. 11(b)(3).

20 To the extent the Court is inclined to order Defendant to produce the
21 documents at issue, Defendant will do so, but Defendant believes that would be
22 unnecessary in light of Fed. R. Civ. P. 26(b)(2)(C)(i), which authorizes the Court to
23 limit discovery if it "can be obtained from some source that is more convenient, less
24 burdensome, or less expensive." Defendant submits that it would be far more
25 convenient for Plaintiff and less burdensome for Defendant if Plaintiff examines his
26 own records to find the responsive documents, rather than having Defendant re-
27 produce the exact same documents that Plaintiff has already produced to Defendant.

28

1 **INTERROGATORY NO. 4:**

2 With respect to each affirmative defense set forth in your Answer to the
3 Complaint, state in detail each and every document that will support that specific
4 defense.

5 **FURTHER RESPONSE TO INTERROGATORY NO. 4:**

6 Responding Party reaffirms and restates all previously asserted objections. The
7 request is incomplete in and of itself in that it requires reference to another
8 document. Also, this request seeks information that is protected by the attorney-
9 client and/or attorney work-product privileges. Calls for legal conclusion, and seeks
10 premature expert discovery. Also, Responding Party has not had an opportunity to
11 depose the plaintiff, and nor has Responding Party had the opportunity to serve
12 written discovery, and depose those parties recently brought into the lawsuit. Further
13 objection is made on the ground that the general denial and all affirmative defenses
14 set forth in Responding Party's Answer to the Complaint on file herein are based
15 upon Responding Party's statutory right to so set forth any and all affirmative
16 defenses, whether or not discovery has revealed such facts to date.

17 Without waiving said objections, Responding Party responds as follows:
18 Responding Party believes that documents responsive to this request are in the
19 possession, custody, or control of Asking Party, such as Plaintiffs medical records,
20 personal income tax statements, personal bank statements, and all other financial
21 documents produced by Plaintiff in support of his claims for damages. The
22 discovery process is continuing. Defendant reserves the right to amend or
23 supplement this response prior to or at the time of trial.

24
25 **PLAINTIFF'S ARGUMENT FOR FURTHER RESPONSE TO**
26 **INTERROGATORY NO. 4**

27 The argument for Further Response To Request For Production No. 4 applies
28 with equal force here. Macy's should be required to state that it has no documents

1 supporting its affirmative defenses so that plaintiff may move for partial summary
2 judgment to eliminate the defenses.

3
4 **DEFENDANT'S OPPOSITION TO PLAINTIFF'S ARGUMENT FOR**
5 **FURTHER RESPONSE TO INTERROGATORY NO. 4**

6 The arguments with respect to Request for Production No. 3 apply with equal
7 force here. Macy's West hereby incorporates those arguments by reference as
8 though stated herein.

9 Further, Defendant submits that it properly identified categories of documents
10 where the responsive information could be found. Pursuant to Fed. R. Civ. P.
11 33(d)(1), a party may point to categories of documents where the information to
12 answer an Interrogatory may be found, so long as the burden is equal to both parties
13 to locate the information from the documents. Here, Macy's West did precisely this,
14 by directing Plaintiff's attention to his previously produced financial and medical
15 records. If Plaintiff believes that this information is insufficient, Plaintiff is fully
16 within his rights to seek partial summary judgment of the defenses at issue, but
17 Macy's West submits that this would be premature given that Plaintiff's deposition
18 has yet to be taken in this case.

19
20 **INTERROGATORY NO. 8:**

21 Please state if in the past 15 years has there been a written claim or demand for
22 compensation for racial profiling against defendant?

23 **FURTHER RESPONSE TO INTERROGATORY NO. 8:**

24 Responding Party reaffirms and restates all previously asserted objections. this
25 interrogatory is vague, ambiguous, overly broad and unduly burdensome as to time
26 and scope. It is unduly burdensome and harassing to request Responding Party to
27 scour its records dating back fifteen years at every store ever in operation. Further,
28 Responding Party objects on the grounds that this excessive scope is irrelevant to the

1 subject matter of this litigation and an attempt by Plaintiff to go on an unjustified
2 fishing expedition. Responding Party contends that Asking Party's attempt to seek
3 information pertaining to any locations apart from the subject premises to this
4 litigation is irrelevant. Additionally, this Interrogatory seeks information protected
5 by the attorney work-product privilege, attorney client privilege or in anticipation of
6 litigation. Further objection on the grounds that this request seeks information barred
7 by Federal Rule of Evidence § 408. This request seeks confidential and private
8 information that, if disclosed, would violate the privacy rights of third parties
9 unrelated to this action.

10 Without waiving said objection and in the spirit of cooperation, Responding
11 Party has run a diligent search and reasonable inquiry into past claims of purported
12 "racial profiling" as the subject location for a period of five years prior to the alleged
13 incident. There have been no prior incidents of alleged "racial profiling" at the
14 subject location from 2009 to present other than this subject litigation. The
15 discovery process is continuing. Defendant reserves the right to amend or
16 supplement this response prior to or at the time of trial.

17
18 **PLAINTIFF'S ARGUMENT FOR FURTHER RESPONSE TO**
19 **INTERROGATORY NO. 8**

20 The argument for further response to Request for Production No. 3 applies
21 with equal force here to the response of Macy's with the exception of the objection
22 based on burden. On that objection, Macy's has not justified its burden to preclude
23 discovery. "The party who resists discovery has the burden to show that discovery
24 should not be allowed, and has the burden of clarifying, explaining, and supporting
25 its objections. [Citation.]" *Directv, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal.
26 2002); see also *Martin v. Easton Pub. Co.*, 85 F.R.D. 312, 316 (E.D. Pa. 1980) ["To
27 resist answering interrogatories, plaintiff cannot invoke the defense of
28 oppressiveness or unfair burden without detailing the nature and extent thereof.

1 Simply decrying the expense to plaintiff will not satisfy this obligation.”] ““In
 2 determining whether a request for discovery will be unduly burdensome to the
 3 responding party, the court weighs the benefit and burden of the discovery. . . . This
 4 balance requires a court to consider the needs of the case, the amount in controversy,
 5 the importance of the issues at stake, the potential for finding relevant material and
 6 the importance of the proposed discovery in resolving the issues””. *Green, supra*,
 7 219 F.R.D. at 493.

8 There is no question the request for information respecting the other claims of
 9 racial profiling is quite relevant and will be admissible on the punitive and treble
 10 damages claim in this case. The damages in controversy in this case exceed
 11 \$500,000 in lost earnings alone. The emotional and mental distress damages are as
 12 significant if not more so. The issues at stake include the apparent long-standing and
 13 continuing racial discrimination and civil rights violations by Macy’s. The requested
 14 information is directly relevant to the issues in the case.

15 Macy’s should be ordered to affirmatively state that it has received racial
 16 profiling claims in the past 15 years. See *Wallace*, et al., cited above.

17
 18 **DEFENDANT’S OPPOSITION TO PLAINTIFF’S ARGUMENT FOR**
 19 **FURTHER RESPONSE TO INTERROGATORY NO. 8; REQUEST FOR**
 20 **PROTECTIVE ORDER**

21 The arguments with respect to Request for Production No. 3 apply with equal
 22 force here, including the Request for Protective Order. Macy’s West hereby
 23 incorporates those arguments by reference as though stated herein.

24
 25 **INTERROGATORY NO. 9:**

26 If your answer to Interrogatory No. 8 above is in the affirmative, state the
 27 name, address and telephone number of each such individual making a claim for
 28 racial profiling.

FURTHER RESPONSE TO INTERROGATORY NO. 9:

Responding Party reaffirms and restates all previously asserted objections, this interrogatory is vague, ambiguous, overly broad and unduly burdensome as to time and scope. It is unduly burdensome and harassing to request Responding Party to scour its records dating back fifteen years at every store ever in operation. Further, Responding Party objects on the grounds that this excessive scope is irrelevant to the subject matter of this litigation and an attempt by Plaintiff to go on an unjustified fishing expedition. Responding Party contends that Asking Party's attempt to seek information pertaining to any locations apart from the subject premises to this litigation is irrelevant. Additionally, this Interrogatory seeks information protected by the attorney work-product privilege, attorney client privilege or in anticipation of litigation. Further objection on the grounds that this request seeks information barred by Federal Rule of Evidence § 408. This request seeks confidential and private information that, if disclosed, would violate the privacy rights of third parties unrelated to this action.

Without waiving said objection and in the spirit of cooperation, Responding Party has run a diligent search and reasonable inquiry into past claims of purported "racial profiling" as the subject location for a period of five years prior to the alleged incident. There have been no prior incidents of alleged "racial profiling" at the subject location from 2009 to present other than this subject litigation made by Plaintiff Alton Harding. The discovery process is continuing, Defendant reserves the right to amend or supplement this response prior to or at the time of trial.

**PLAINTIFF'S ARGUMENT FOR FURTHER RESPONSE TO
INTERROGATORY NO. 9**

The arguments for further response to the Request for Production No. 3 and for Interrogatory No. 8 apply with equal force here to the response of Macy's. Macy's should be order to provide the identity of those persons making racial

1 profiling claims against it.

2
3 **DEFENDANT'S OPPOSITION TO PLAINTIFF'S ARGUMENT FOR**
4 **FURTHER RESPONSE TO INTERROGATORY NO. 9; REQUEST FOR**
5 **PROTECTIVE ORDER**

6 The arguments with respect to Request for Production No. 3 and Interrogatory
7 No. 8 apply with equal force here, including the Request for Protective Order.
8 Macy's West hereby incorporates those arguments by reference as though stated
9 herein.

10
11
12 **INTERROGATORY NO. 10:**

13 If any lawsuit was filed for racial profiling against defendant in the last 20
14 years, state the name, address and telephone number of the attorney representing any
15 individual who made such a claim.

16 **FURTHER RESPONSE TO INTERROGATORY NO. 10:**

17 Responding Party reaffirms and restates all previously asserted objections. this
18 interrogatory is vague, ambiguous, overly broad and unduly burdensome as to time
19 and scope. It is unduly burdensome and harassing to request Responding Party to
20 scour its records dating back fifteen years at every store ever in operation. Further,
21 Responding Party objects on the grounds that this excessive scope is irrelevant to the
22 subject matter of this litigation and an attempt by Plaintiff to go on an unjustified
23 fishing expedition. Responding Party contends that Asking Party's attempt to seek
24 information pertaining to any locations apart from the subject premises to this
25 litigation is irrelevant. Additionally, this Interrogatory seeks information protected
26 by the attorney work-product privilege, attorney client privilege or in anticipation of
27 litigation. Further objection on the grounds that this request seeks information barred
28 by Federal Rule of Evidence § 408. This request seeks confidential and private

1 information that, if disclosed, would violate the privacy rights of third parties
2 unrelated to this action.

3 Without waiving said objection and in the spirit of cooperation, Responding
4 Party has run a diligent search and reasonable inquiry into past claims of purported
5 "racial profiling" as the subject location for a period of five years prior to the alleged
6 incident. There have been no prior incidents of alleged "racial profiling" at the
7 subject location from 2009 to present other than this subject litigation made by
8 Plaintiff Alton Harding by his attorney of record, Barry Zelner. The discovery
9 process is continuing. Defendant reserves the right to amend or supplement this
10 response prior to or at the time of trial.

11
12 **PLAINTIFF'S ARGUMENT FOR FURTHER RESPONSE TO**
13 **INTERROGATORY NO. 10**

14 The arguments for further response to the Request for Production No. 3 and
15 for Interrogatory No. 8 apply with equal force here to the response of Macy's.
16 Macy's should be ordered to identify the attorneys who have sued Macy's for racial
17 profiling in the last 20 years.

18
19 **DEFENDANT'S OPPOSITION TO PLAINTIFF'S ARGUMENT FOR**
20 **FURTHER RESPONSE TO INTERROGATORY NO. 10; REQUEST FOR**
21 **PROTECTIVE ORDER**

22 The arguments with respect to Request for Production No. 3 and Interrogatory
23 No. 8 apply with equal force here, including the Request for Protective Order.
24 Macy's West hereby incorporates those arguments by reference as though stated
25 herein.

26 Further, Defendant Macy's West notes that this Interrogatory, in contrast to
27 the other Interrogatories, is considerably more overbroad: this Interrogatory, for
28 unexplained reasons, seeks 20 years' worth of information, whereas the other

1 Interrogatories are limited to **15 years**. As discussed above, even the 15 years'
2 limitation is still overbroad as to time, such that the 20 years is even more overbroad.

3
4 **INTERROGATORY NO. 11:**

5 Did defendant ever pay any type of fine to any state or federal government for
6 alleged racial profiling?

7 **FURTHER RESPONSE TO INTERROGATORY NO. 11:**

8 Responding Party reaffirms and restates all previously asserted objections. this
9 interrogatory is vague, ambiguous, overly broad and unduly burdensome as to time
10 and scope. It is unduly burdensome and harassing to request Responding Parry to
11 scour its records dating back fifteen years at every store ever in operation. Further,
12 Responding Party objects on the grounds that this excessive scope is irrelevant to the
13 subject matter of this litigation and an attempt by Plaintiff to go on an unjustified
14 fishing expedition. Responding Party contends that Asking Party's attempt to seek
15 information pertaining to any locations apart from the subject premises to this
16 litigation is irrelevant. Additionally, this Interrogatory seeks information protected
17 by the attorney work-product privilege, attorney client privilege or in anticipation of
18 litigation. Further objection on the grounds that this request seeks information barred
19 by Federal Rule of Evidence § 408. This request seeks confidential and private
20 information that, if disclosed, would violate the privacy rights of third parties
21 unrelated to this action.

22 Without waiving said objection, Responding Party responds as follows: After
23 a diligent search and reasonable inquiry, with respect to the subject location,
24 Responding Party is not aware of the existence of any fines for allegations of racial
25 profiling.

26 **PLAINTIFF'S ARGUMENT FOR FURTHER RESPONSE TO**
27 **INTERROGATORY NO. 11**

28 The arguments for further response to the Request for Production No. 3 and

1 for Interrogatory No. 8 apply with equal force here to response of Macy's. Macy's
2 should be order to affirmatively state that it has been fined for racial profiling. See
3 *People v. Macy's, supra*.

4
5 **DEFENDANT'S OPPOSITION TO PLAINTIFF'S ARGUMENT FOR**
6 **FURTHER RESPONSE TO INTERROGATORY NO. 11; REQUEST FOR**
7 **PROTECTIVE ORDER**

8 The arguments with respect to Request for Production No. 3 and Interrogatory
9 No. 8 apply with equal force here, including the Request for Protective Order.
10 Macy's West hereby incorporates those arguments by reference as though stated
11 herein.

12
13 **INTERROGATORY NO. 12:**

14 If your answer to Interrogatory No. 11 above is in the affirmative, state the
15 amount paid and who the fine was paid to, including the date of payment.

16 **FURTHER RESPONSE TO INTERROGATORY NO. 12:**

17 Not Applicable.

18
19 **PLAINTIFF'S ARGUMENT FOR FURTHER RESPONSE TO**
20 **INTERROGATORY NO. 12**

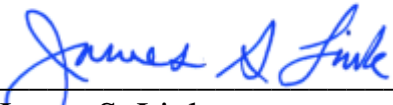
21 The arguments for further response to the Request for Production No. 3 and
22 for Interrogatory No. 8 apply with equal force here to response of Macy's. Macy's
23 should be order to provide the information requesting all the fines it has paid for
24 racial profiling.

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S ARGUMENT FOR
FURTHER RESPONSE TO INTERROGATORY NO. 12; REQUEST FOR
PROTECTIVE ORDER**

The arguments with respect to Request for Production No. 3 and Interrogatory No. 8 apply with equal force here, including the Request for Protective Order. Macy's West hereby incorporates those arguments by reference as though stated herein.

Date: 11/14/16

LAW OFFICE OF BARRY S. ZELNER

By: 
James S. Link
Associated Counsel for Barry S. Zelner
Attorneys for Plaintiff

Date: 11/15/16

MANNING & KASS
ELROD, RAMIREZ, TRESTER LLP

By: /s/ Marcia E. Cook
Jeffrey M. Lenkov
Marcia E. Cook
Attorneys for Defendant
Macy's West Stores, Inc.